№. 44387-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent,

v.

NORMAN R. ADAMS,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 11-1-01148-6
The Honorable M. Karlynn Haberly, Presiding Judge

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4. The trial court abused its discretion in denying Mr. Adams' CrR 7.5 and CrR 7.8 motions for relief from judgment and for a new trial.

B. ISSUES PRESENTED

1. Was Mr. Adams deprived of a fair trial where the jury instructions were not accurate statements of Washington law and confused the jury? (Assignment of Error No. 1)

2. Did Mr. Adams receive ineffective assistance of counsel where his trial counsel failed to ensure the jury received instructions which completely and accurately defined the legal terms central to Mr. Adams' defense? (Assignment of Error No. 2)

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5. Did the State present sufficient evidence to convict Mr. Adams of unlawful possession of a firearm where the State presented insufficient evidence to establish that Mr. Adams possessed the gun knowingly? (Assignment of Error No. 3)

6. Did the trial court abuse its discretion in denying Mr. Adams' post-trial motions where Mr. Adams was denied effective assistance of counsel and the State presented insufficient evidence to convict him of unlawful possession of a firearm? (Assignments of Error Nos. 1, 2, 3, and 4)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On November 12, 2011, Kitsap County Sheriff's deputies responded to a call

regarding a domestic violence assault complaint. CP 6. Police arrived at the location and were met by Christina Boyd, Clayton Young, and Larane Wuilliez. CP 6. Ms. Boyd is Ms. Wuilliez's friend. CP 6. Mr. Young is Ms. Boyd's fiancée. CP 6. Ms. Boyd had called the police earlier in the evening and asked them to conduct a welfare check at Ms. Wuilliez's home after Ms. Boyd had been unable to get in contact with Ms. Wuilliez. CP 6. Mr. Young met the police in Ms. Wuilliez's driveway and told them that Ms. Wuilliez was shaken up and scared. CP 6.

Police contacted Ms. Wuilliez inside her residence and observed that there was blood on her face, both of here eyes looked black and swollen, her nose looked swollen, and there were red marks on her face and neck. CP 6. Ms. Wuilliez told the police that the red marks were from being assaulted. RP 6.

Ms. Wuilliez told police that she had been assaulted by her boyfriend, Norman Adams. CP 6. Ms. Wuilliez told police that Mr. Adams abused her every couple of weeks. CP 6. Ms. Wuilliez said that she had been pressing Mr. Adams for rent money but Mr. Adams wouldn't give her any money and the couple got into an argument. CP 6-7. Ms. Wuilliez told police that Mr. Adams struck her in the face and knocked her to the ground then pinned his knees on her neck and began to strangle her. CP 7. Ms. Wuilliez told police that Mr. Adams then got in the shower and made her sit in the shower with him so he could keep an eye on her. CP 7. Ms. Wuilliez told police that she told Mr. Adams that she wanted to leave but that he wouldn't let her. CP 7. Ms. Wuilliez told police that she thought Mr. Adams would beat her if she tried to leave. CP 7.

After Mr. Adams' finished showering, Ms. Wuilliez laid down on the bed and Mr. Adams gave her ice for her neck. CP 7. Ms. Wuilliez told police that Mr. Adams then

left the house, telling her that he was going to collect debts to get money to pay the rent. CP 7.

The police provided Ms. Wuilliez with a DV information pamphlet and left. CP 7.

Later that day, Ms. Boyd called police and told them that while packing up MS. Wuilliez's things, they had discovered a revolver and ammunition. CP 7. Police responded and confiscated the firearm. CP 7.

Later, Ms. Wuilliez called 911 and reported that she had just seen Mr. Adams at her house. CP 7. Police arrived in the area within minutes and arrested Mr. Adams. CP 7-8. The police advised Mr. Adams of his constitutional rights. CP 8. Mr. Adams waived his rights and agreed to speak with police. CP 8.

Mr. Adams admitted that he and Ms. Wuilliez had been in an argument. CP 8. Mr. Adams said that the argument was about rent money and that Ms. Wuilliez was calling him names and pushing his buttons. CP 8. Mr. Adams told police that he slapped and pushed Ms. Wuilliez when she wouldn't let him get out of the shower. CP 7. Mr. Adams said that he knew Ms. Wuiliez would have injuries on her face and suggested that Ms. Wuilliez might have fallen against the washing machine when the police told Mr. Adams about the extent of Ms. Wuilliez's injuries. CP 8. Ultimately, Mr. Adams requested an attorney and police transported him to jail. CP 8.

On December 21, 2011, Mr. Adams was charged with one count of assault in the second degree and one count of unlawful imprisonment, both with domestic violence aggravating factors. CP 1-3.

On February 27, 2012, the State filed a motion in limine seeking to admit

evidence of prior physical assaults by Mr. Adams against Ms. Wuilliez under ER 404(b) to permit the jury to assess Ms. Wuilliez's credibility and to illustrate Ms. Wuilliez's fear. CP 13-22.

On April 17, 2012, the charges against Mr. Adams were amended to one count of second degree assault with a domestic violence aggravating factor, two counts of unlawful imprisonment with a domestic violence aggravating factor, and one count of unlawful possession of a firearm in the second degree. CP 26-29. Argument on the State's motion to admit evidence of prior incidents of domestic violence was also heard on April 17, 2012. RP 37-46, 4-17-12.[1] The trial court held that evidence relating to three prior incidents could be introduced, but held that evidence relating to three others identified by the State was not. RP 43-45, 4-17-12.

On April 18, 2012, Mr. Adams stipulated that his statements to police were admissible. CP 40-41. Mr. Adams' trial also started on April 18, 2012. RP 81, 4-18-12.

At trial, the State introduced photographs taken of Ms. Adams' injuries on November 12, 2011. RP 90-91, 117-119, 4-18-12. Ms. Wuilliez testified that she and Mr. Adams got in a fight over rent money, that he pushed her down and hit her in the face, that he punched her in the nose and choked her until she saw spots, and that he made her get in the shower with him until he was done showering. RP 306-314, 4-19-12. The State offered the testimony of the police officers who responded to Ms. Wuilliez's home on November 12, 2011, and their description of Ms. Wuilliez's injuries. RP 112-116, 4-18-12.

Ms. Boyd testified that the gun was found in a shed in the back yard of the house.

[1] The volumes of the transcript of Mr. Adams' trial are not numbered continuously. Reference to the record will be made by giving the page citation followed by the date of the hearing being referenced.

RP 216-17, 4-19-12. Ms. Boyd also offered testimony about prior times when she had observed bruising on Ms. Wuilliez's body. RP 220-222, 4-19-12.

Mr. Young testified that he found the gun in a locked shed. RP 242-243, 4-19-12. Mr. Young also testified that he had to cut the lock off the shed. RP 243, 4-19-12. Ms. Wuilliez testified that the key to the shed was kept in the kitchen and that her brother and her brother's significant other had stayed in the home. RP 321-322, 4-19-12.

Mr. Adams testified that he had no idea the gun was in the shed, had no guns in the house, and did not own a gun. RP 357-358, 4-19-12.

Trial counsel for Mr. Adams did not object to the State's proposed instructions regarding the crime of unlawful possession of a firearm. During jury deliberations the jury requested clarification of jury instruction 23, the instruction discussing "dominion and control" as it related to the definition of possession for the unlawful possession of a firearm charge. CP 107, 115. Without objection from Mr. Adams' trial counsel, the court did not offer any clarification of the instruction. CP 115; RP 518, 4-23-12.

Mr. Adams was found guilty of second degree assault, guilty of one count of unlawful imprisonment, and guilty of unlawful possession of a firearm. CP 117-118, 124-125, RP 519-520, 4-23-19. The jury found that Mr. Adams assaulted Ms. Wuilliez by strangulation and with the intent to commit a felony. CP 120. The jury also found that the assault and unlawful imprisonment were also crimes of domestic violence. CP 121-122.

On May 4, 2012, after the jury returned its verdict but before sentencing, appellate counsel Bryan Hershman substituted for Mr. Adams' previous trial counsel, Clayton Longacre. CP 129-131.

On May 11, 2012, Mr. Hershman filed a motion for arrest of judgment, new trial, and relief from judgment. CP 133-140.

On May 18, 2012, Mr. Hershman filed a motion to continue sentencing and the post-trial motions date. CP 141-142.

On June 28, 2012, Mr. Hershman filed a Motion for Relief from Judgment and for New Trial under CrR 7.5 and CrR 7.8. CP 143-188. Mr. Hershman filed the same motion again on June 29, 2012, this time with additional attachments. CP 189-239.

On July 31, 2012, the State filed a response to Mr. Hershman's post-trial motions. CP 240-244.

On November 2, 2012, Mr. Hershman filed a declaration of Shane Adams regarding a conversation Shane Adams had with Mr. Adams' previous trial counsel, Clayton Longacre, regarding any potential plea offer from the State. CP 249-250. On November 2, 2012, Mr. Hershman also filed the declaration of Norman Adams, Senior, wherein he also detailed conversations he had with Mr. Longacre regarding potential plea offers from the State. CP 251-254. Mr. Hershman also filed a declaration of Gloria McNally regarding her interaction with Mr. Longacre's secretary. CP 255-257.

On November 15, 2012, Mr. Hershman filed a bench memorandum regarding the criminal defense attorney's obligations to communicate plea offers to their clients. CP 259-262.

On December 11, 2012, the State filed a memorandum of authorities in response to Mr. Hershman's motion for relief from judgment and motion for a new trial. CP 266-274.

On December 17, 2012, a hearing regarding Mr. Hershman's post-trial motions

was held before visiting Judge Vicki Hogan. RP 1-85, 12-17-12. At this hearing, Mr. Longacre testified that he had never said no to a plea offer that was "on the table," he never told anyone that there was no plea offer "on the table," that he never said that if there was a plea offer "on the table" that the judge would not accept it, that he had asked the prosecutor about a plea offer and the prosecutor had made an offer in the 30 month range, and that on the day that jury voir dire was to begin he had communicated the 30 month plea offer to Mr. Adams but Mr. Adams ultimately rejected the offer. RP 6-16, 12-17-12. Mr. Longacre confirmed that he had previously been suspended from the bar for failing to communicate plea offers to his clients.[2] RP 18, 12-17-12.

Norman Adams, Senior, also testified at the December 17, 2012 hearing. RP 25-34, 12-17-12. Norman Adams, Senior, testified that he had spoken with Mr. Longacre about the potential of settling Mr. Adams' case with a plea, but that Mr. Longacre had told him that there had been no plea offer and, if there had been a plea offer, that the judge would not allow it anyway. RP 25-28, 12-17-12. Norman Adams, Senior, also testified that he spoke with Mr. Adams in court about any possible plea offer and Mr. Adams had told him that Mr. Adams had not been informed of any plea offer. RP 29, 12-17-12.

Kelly Montgomery, the prosecutor who handled Mr. Adams' case also testified at the December 17, 2012 hearing. RP 35-54, 12-17-12. Ms. Montgomery testified that at the time she took over the prosecution of Mr. Adams, there was a plea offer "on the table." RP 36, 12-17-12. Ms. Montgomery testified that she never extended a formal plea offer to Mr. Adams through Mr. Longacre, but that she and Mr. Longacre engaged in a series of e-mails discussing potential modifications to the charges, culminating in an

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[2]. Mr. Longacre has since been disbarred.

offer from the State of assault 3 with an exceptional low. RP 37-38, 12-17-12. Ms. Montgomery also testified that she and Mr. Longacre had numerous discussions regarding the potential length of Mr. Adams' sentence should he accept the assault 3 offer. RP 38, 12-17-12. Ms. Montgomery testified that these conversations culminated in her offering a 24 month exceptional low sentence and that after she made this offer she saw Mr. Longacre immediately have a discussion with Mr. Adams. RP 38, 12-17-12. Ms. Montgomery did not hear what was said between Mr. Longacre and Mr. Adams, but Mr. Longacre returned to Ms. Montgomery and said, "gross misdemeanor or trial," which Ms. Montgomery took to mean that Mr. Longacre had communicated her offer to Mr. Adams but Mr. Adams had rejected the offer. RP 39, 12-17-12.

Ms. Montgomery testified that shortly before trial started she had further plea discussions with Mr. Longacre in which Mr. Longacre indicated that he still wanted a gross misdemeanor. RP 40, 12-17-12. Ms. Montgomery replied that since trial had started, Mr. Adams could still get the exceptional low offer of 24 months and the State would dismiss one of the unlawful imprisonment charges but Mr. Adams would have to plead to assault in the second degree. RP 40, 12-17-12. Ms. Montgomery testified that she saw Mr. Longacre immediately enter the courtroom and speak to Mr. Adams for about ten minutes, but that Mr. Longacre exited the courtroom and told Ms. Montgomery that Mr. Adams wanted a gross misdemeanor. RP 40-41, 12-17-12.

Ms. Montgomery testified that after trial she was in the jail speaking with Mr. Adams and Mr. Adams was talking about the fact that he was going to jail for a long time. RP 42, 12-17-12. Mr. Montgomery responded by asking Mr.Adams why he didn't take the deal for 24 months and Mr. Adams responded by looking shocked, dazed, teary-

eyed, and upset, and telling Ms. Montgomery that he was not aware of any deal. RP 42-43, 12-17-12.

Mr. Adams also testified at the December 17, 2012 hearing. RP 55-70, 12-17-12. Mr. Adams testified that Mr. Longacre only discussed continuances, not plea offers, with him during their discussions in the courthouse and that Mr. Adams spoke with Mr. Longacre in the jail about plea negotiations but that Mr. Longacre always said the State was firm on the 84 month offer. RP 56-58, 12-17-12. Mr. Adams testified that the discussion between himself and Mr. Longacre on the first day of trial concern whether or not the State was making a plea offer but that Mr. Longacre repeated that the State was firm on what they had offered originally and that they were not offering assault 4. RP 60, 12-17-12. Mr. Adams testified that the idea of pleading to an assault 4 charge was not a bottom line issue for him but that it was something that Mr. Longacre kept bringing up. RP 60, 12-17-12. Mr. Adams testified that he was never told by Mr. Longacre that there was an offer for a 24 sentence from the State and that if he had been aware of such an offer her would have taken it. RP 61, 12-17-12. Mr. Adams also testified that the first he heard that there had been a 24 month offer was when he spoke with Ms. Montgomery in the jail and that he was shocked and devastated when he learned of the offer. RP 61-62, 12-17-12. Mr. Adams testified that Mr. Longacre never communicated to him that there was an offer for 24 or 30 or even 36 months from the State. RP 63-64, 12-17-12. Mr. Adams testified that he was 100% certain that no offer for 24 or 30-some-odd months was ever communicated to him. RP 68, 12-17-12.

Judge Hogan ultimately denied Mr. Hershman's motion for relief from judgment on the basis that Mr. Longacre had provided ineffective assistance of counsel by failing

to communicate plea offers to Mr. Adams. RP 82-83, 12-17-12.

On January 8, 2013, a hearing was held at which the trial court denied Mr. Hershman's motions for new trial and for relief from judgment. RP 2-5, 1-8-13. No written findings of fact or conclusions of law were ever entered for any of the post-trial motions.

On January 9, 2013, Mr. Adams was sentenced to 63 months imprisonment, the low end of the standard range. CP 278-288; RP 9-10, 1-9-13.

Notice of Appeal to the Court of Appeals was filed on January 9, 2013. CP 290.

D. ARGUMENT

1. Mr. Adams' right to a fair trial was violated where the jury instructions were not accurate statements of Washington law and confused the jury.

Both the United States Constitution and the Washington State Constitution article I, section 22, guarantee the criminal defendant a fair trial by an impartial jury. *State v. Latham*, 100 Wn.2d 59, 62-63, 667 P.2d 56 (1983).

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). "Failure to give such instructions is prejudicial error." *State v. Riley*, 137 Wn.2d 904, 908 n. 1, 976 P.2d 624 (1999). Further, a criminal defendant is entitled to jury instructions that accurately state the law, permit him to argue his case theory, and are supported by the evidence. *State v. Staley*, 123 Wn.2d 794, 803, 872 P.2d 502 (1994).

"To satisfy the constitutional demands of a fair trial, the jury instructions, when read as a whole, must correctly tell the jury of the applicable law, not be misleading, and permit the defendant to present his theory of the case." *State v. O'Hara*, 167 Wn.2d 91,

105, 217 P.3d 756 (2009), *citing State v. Mills*, 154 Wn.2s 1, 7, 109 P.3d 415 (2005).

"Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." *State v. Brown*, 132 Wn.2d 529, 611–12, 940 P.2d 546 (1997), *cert. denied* 523 U.S. 1007, 118 S.Ct. 1192, 140 L.Ed.2d 322 (1998).

Where a defendant is denied the right to a fair trial, the proper remedy is reversal of the conviction and remand for a new trial. *State v. McDonald*, 96 Wn.App. 311, 979 P.2d 857 (1999), affirmed 143 Wn.2d 506, 22 P.3d 791 (2001).

Mr. Adams was charged with unlawful possession of a firearm in the second degree. Under RCW 9.41.040(2)(a)(i), "A person...is guilty of the crime of unlawful possession of a firearm in the second degree if...the person owns, has in his or her possession, or has in his or her control and firearm...after having previously been convicted...in this state...of any felony."

Possession may be actual or constructive. *Staley*, 123 Wn.2d at 798, 872 P.2d 502. To establish constructive possession, the State must show that a defendant had dominion and control over the firearm or over the premises where the firearm was found. *State v. Raleigh*, 157 Wn.App. 728, 737, 238 P.3d 1211 (2010), *review denied*, 170 Wn.2d 1029 (2011); *State v. Mathews*, 4 Wn.App. 653, 656, 484 P.2d 942 (1971). "Knowing possession" is an essential element of the crime of unlawful possession of a firearm. *State v. Anderson*, 141 Wn.2d 357, 366-367, 5 P.3d 1247 (2000). Thus, where the State alleges constructive possession of a firearm, the State must still establish that the firearm was knowingly possessed.

Mr. Adams was not found in actual possession of a firearm and therefore could

not be charged with having actual possession of a firearm. Instead, the State charged Mr. Adams with being in constructive possession of the gun found in the shed on a theory that Mr. Adams had dominion and control of the shed and therefore had dominion and control of the firearm. RP 451-453, 4-20-12.

Jury instructions 20, 21, and 23 were the unlawful possession of a firearm definition instruction, the "to convict" instruction, and the possession definition instruction, respectively. CP 104, 105, 107. As will be discussed below, jury instructions 20 and 23 misstated the law regarding unlawful possession of a firearm and conflicted with instruction 21.

a. Jury instruction 20 misstated the elements of the crime of unlawful possession of a firearm.

Jury instruction number 20 defined the crime of unlawful possession of a firearm to the jury as follows: "A person commits the crime of unlawful possession of a firearm in the second degree when he or she knowingly owns a firearm or has a firearm in his or her possession or control and he or she has previously been convicted of a felony."

As stated above, "knowing possession" is an essential element of the crime of unlawful possession of a firearm. *Anderson*, 141 Wn.2d at 366-367, 5 P.3d 1247. A juror reading instruction 20 could interpret it to mean that the crime of unlawful possession of a firearm is committed in two alternative means: (1) knowingly owning a firearm; or (2) having a firearm in one's possession or control, notwithstanding his ***knowledge*** of the same. The failure of the instruction to clearly indicate that the crime of unlawful possession of a firearm is committed only when an individual ***knowingly*** owns or ***knowingly*** has a firearm in his or her possession constituted a misstatement of the law. This misstatement of the law is particularly prejudicial in this case where the allegation

was one of constructive possession of the firearm. Further, the jury question, infra., demonstrates how the jury was struggling with this very question.

b. Jury instruction 20 conflicted with jury instruction 21.

Jury instruction 21 correctly informed the jury that in order for the State to prove Mr. Adams committed the crime of unlawful possession of a firearm, the State had the burden of proving that Mr. Adams either *knowingly* owned a firearm or *knowingly* had a firearm in his possession or control. Jury instruction 20 directly conflicted with jury instruction 21 in that jury instruction 20 did not indicate that Mr. Adams had to *knowingly* have a firearm in his possession. Jury instructions 20 and 21 were in conflict and confused the jury.

c. Jury instruction 23 was an improper and confusing instruction where it failed to define "dominion and control" in a way easily understandable to the jury.

"Trial courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory." *Brown*, 132 Wn.2d at 611–12, 940 P.2d 546. When a statute does not define a term, the court may consider the plain and ordinary meaning as set forth in a standard dictionary. *State v. Sullivan*, 143 Wn.2d 162, 184–85, 19 P.3d 1012 (2001).

"Dominion and control" is a legal term of art which is not used in the everyday conversations of non-lawyers. Jury instruction 23 was a direct quote of the pertinent language of WPIC 133.52. While the phrase "dominion and control" is used several times in instruction 23, and while instruction 23 discusses factors the jury was to consider in determining if Mr. Adams had dominion and control over the gun, neither instruction

23 nor WPIC 133.52 actually defines what "dominion and control" means.

The phrase "dominion and control" is not an expression "of ordinary understanding" or one that is self-explanatory. In this case, the jury's proper understanding of dominion and control was a core component of Mr. Adams' defense. Critical to Mr. Adams' defense was the idea that, even though Mr. Adams stored items in the shed and it was locked, Mr. Adams did not have "dominion and control" over the shed because other people had access to the shed and also stored items there.

During jury deliberations, the jury sent out a question asking for clarification of jury instruction number 23 as it pertained to "dominion and control." CP 116. Thus, it is clear that "dominion and control" is not a term that was of ordinary understanding or self-explanatory and that instruction 23 did not adequately define the concept of "dominion and control" to allow the jury to understand its meaning.

When the jury asked for clarification of jury instruction 23, the trial court should have provided further instruction based on a standard dictionary definition of the terms dominion and control. The 2005 edition of Webster's New College Dictionary defines "dominion" in the legal context as "ownership." Webster's New College Dictionary, 425 (2005). The 2005 edition of Webster's New College Dictionary defines control as "to exercise authority over." Webster's New College Dictionary, 317 (2005).

Inherent in the notion of someone exercising "dominion and control" over an item is the requirement that that person be aware that the item exists. For example, Oregon Revised Statute (ORS) 166.270 provides that a person commits the crime of being a felon in possession of a firearm if the person "has been convicted of a [and] owns or has in the person's possession or under the person's custody or control any firearm." These

elements are nearly identical to RCW 9.41.040(2)(a)(i). In interpreting ORS 166.270, Oregon courts have acknowledged that the concepts of constructive possession and dominion and control of a gun both have a requirement that an individual be aware of the gun. *See State v. Casey*, 346 Or. 54, 60-61, 203 P.3d 202 (2009), (conviction for possession of firearm by a felon vacated where defendant had no knowledge a guest in his trailer was carrying a concealed pistol); *State v. Miller*, 238 Or. 411, 414, 395 P.2d 159 (1964) (evidence was sufficient to establish that the defendant was in constructive possession of three guns found in the car which the defendant was driving because the evidence was sufficient to establish that the defendant was aware of the guns).

Black's Law Dictionary defines "dominion" as "ownership, or right to property." The online version of Black's Law Dictionary, online at http://thelawdictionary.org/dominion/ , defines ***dominion*** as follows:

> ***Ownership***, or right to property. 2 Bl. Comm. 1. Title to an article of property which arises from the power of disposition and the right of claiming it Bilker v. Westcott, 73 Tex. 129, 11 S. W. 157. "The holder has the dominion of the bill." 8 East, 579.Sovereignty or lordship; as the dominion of the seas. Moll, de Jure Mar. 91, 92. In the civil law, with reference to the title to property which is transferred by a sale of it, dominion is said to he either "proximate" or "remote." the former being the kind of ***title vesting in the purchaser when he has acquired both the ownership and the possession of the article, the latter describing the nature of his title when he has legitimately acquired the ownership of the property*** but there has been no delivery. Coles v. Perry, 7 Tex. 109.

http://thelawdictionary.org/dominion/#ixzz2UlFj5tzC (emphasis added)

Further, Black's Law dictionary defines ***control*** as:

> The detention and control, or the manual or ideal custody, of any- thing which may be the subject of property, for one's use and enjoyment, ***either as owner or as the proprietor of a qualified right in it***, and either held personally or by another who exercises it in one's place and name. That condition of facts under which one can ***exercise his power over a corporeal thing at his pleasure to the exclusion of all other persons.*** See

> Staton v. Mullis, 92 N. C. 032; Suuol v. Hepburn, 1 Cal. 203; Cox v. Deviu- ney, 05 N. J. Law, 3S9, 47 Atl. 570; Churchill v. Onderdonk, 59 N. Y. 130; Itice v. Frayser (C. C.) 24 Fed. 400; Travers v. McElvain, 181 111. 382, 55 N. E. 135; Emmerson v. State, 33 Tex. Cr. It. S9, 25 S. V. 289; Slater v. Rawson, 0 Mete. (Mass.)t 444.

http://thelawdictionary.org/possession/#ixzz2UlGe7n6P (emphasis added)

Black's Law Dictionary describes "**possession**" as "**the detention and control...of anything which may be the subject of property, for one's use and enjoyment...as owner**." Emphasis added.

Accordingly, a properly worded jury instruction 23 should have included a definition of dominion and control similar to the following:

> An individual has dominion and control over an object or area when that individual:
>
> (1) knows of the existence of the object; and
>
> (2) has control over the object such that that individual may use the object as if the individual was the owner of the object

An element of ***ownership***, or ***exclusivity***, should have been provided to the jury.

Absent such an explanation, instruction 23 was improper and confusing to the jury. Unfortunately, jury instruction 23 was inextricably linked to instructions 20 and 21 since the issue for the jury was whether or not Mr. Adams had constructive possession of the firearm based on his dominion and control of the shed.

Under instructions given that properly define the law, Defendant would not have been convicted because the State failed to present **any** evidence that Mr. Adams knew the gun was in the shed or even knew the gun existed. A correct definition of dominion and control would have included an explanation that one cannot be said to have constructive possession of an item one does not know exists.

d. The jury instructions deprived Mr. Adams of a fair trial since the jury instructions did not accurately state the law.

The State's theory of the case was that Mr. Adams had dominion and control over the shed and therefore was in constructive possession of the firearm. Thus, the jury instructions defining the crime of unlawful possession of a firearm and defining constructive possession and dominion and control were central to the case. During jury deliberations, the jury sent out a question asking for clarification of jury instruction number 23 as it pertained to "dominion and control" and that possession ***"need not be exclusive"*** to the finding of constructive possession. The jury specifically requested definition and clarification of these two concepts. Mr. Adams' defense at trial was that he did not know the gun was in the shed and that other people had access to the shed and stored things in the shed. Despite the fact that the jury was seeking clarification of concepts central to Mr. Adams' defense, the court refused to clarify the term "dominion and control" for the jury. RP 2, 4-23-12. The jury expressly asked,

> **"We request further clarification on #23 as it pertains to 1) "dominion and control" and the 2) "need not be exclusive" to finding of constructive possession. Request definition & clarification."**

CP 115. The jury's question is spot on, and emphasizes the error of the Court in not providing guidance to the jury in the deficiency of the definition of "dominion and control," and it highlights the failure of trial-defense-counsel in failing to propose an instruction.

The jury instructions given to the jury misstated the law and were inconsistent with regards to the legal requirement that constructive possession of the gun had to have been knowing in order to constitute a crime. The contradiction in the language of jury

instructions 20 and 21 combined with the confusing language of jury instruction 23 deprived Mr. Adams of a fair trial.

2. Mr. Adams received ineffective assistance of counsel where his trial counsel failed to ensure the jury received instructions which completely and accurately defined the legal terms central to Mr. Adams' defense.

Article 1, § 22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the States through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel.").

A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *Hughes*, 106 Wn.2d at 191, 721 P.2d 902. "Failure to give such instructions is prejudicial error." *Riley*, 137 Wn.2d at 908 n. 1, 976 P.2d 624 .

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (*citing State v. Rosborough*, 62 Wn..App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel's performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption that trial counsel's performance was adequate, and

exceptional deference must be given when evaluating counsel's strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing Strickland*, 466 U.S. at 689). If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (*citing State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

"The incompetence or neglect of a party's own attorney generally is not excusable neglect." *State v. Florencio*, 88 Wn.App. 254, 259, 945 P.2d 228 (1997), *review denied* 134 Wn.2d 1026, 958 P.2d 314 (1998).

As held in *Riley, supra*, the failure to give instructions on the defendant's theory of the case where such instructions are accurate statements of the law and are supported by the facts of the case is prejudicial error.

As discussed above, jury instructions 20 and 21 are internally inconsistent and constitute a misstatement of the law since jury instruction 20 indicates an individual can commit the crime of unlawful possession of a firearm by having constructive but unknowing possession of a firearm. Despite this, trial counsel for Mr. Adams failed to object to the instructions. Further, when the jury requested further clarification of what it meant to be in dominion and control of an item and how that concept interfaced with the concept of Mr. Adams not having exclusive possession to have constructive possession, counsel for Mr. Adams should have seized the opportunity to clarify the phrase for the jury. Failure to request that a complete and clear definition of all legal terms applicable to the charges was ineffective assistance of counsel where Mr. Adams' guilt turned on the jury having a proper understanding of what "dominion and control" means. Trial

counsel's failure to object to instructions 20 and 21 and failure to seek a clarifying instruction regarding instruction 23 was not a legitimate trial strategy and was not objectively reasonable where Mr. Adams' defense in the case was that he was not in constructive possession of the firearm since he did not have dominion and control over it or the premises where it was found and did not know the gun was in the shed.

As discussed further below, the State produced insufficient evidence to establish that Mr. Adams possessed the handgun knowingly. The "knowingly" elements is directly linked to the jury's confusion about exclusive possession and dominion and control. Mr. Adams was prejudiced by his trial counsel's failure to object to the instructions and failure to request a clarifying instruction in that the jury decided his case with improper and confusing instructions.

3. Mr. Adams' received ineffective assistance of counsel where his trial counsel failed to call witnesses whose testimony would have strongly bolstered Mr. Adams' defense.

As discussed above, Mr. Adams' defense in this case was that he did not know about the gun in the shed and that other people had access to the shed that could have placed the gun there. The only witness called in Mr. Adams' defense was Mr. Adams himself. Mr. Longacre was contacted by numerous witnesses who had known Mr. Adams for years and who told Mr. Adams' prior trial counsel that they had never seen Mr. Adams with a gun and that Mr. Adams never had anything to do with guns. *See* declarations of Scott McLeod, Patrick Lacy, Marlin Willard, Dona Marie Jones, Brock Chambers, and Cynthia Adams, attached to Mr. Hershman's Motion for relief from Judgment, CP 189-239. These same witnesses told Mr. Longacre that the key to the shed hung on a cabinet in the kitchen and that the shed was often left unlocked. *See*

declarations of Scot McLeod, Patrick Lacy, and Marlin Willard, attached to Mr. Hershman's Motion for relief from Judgment, CP 189-239. Despite these witnesses contacting Mr. Adams' prior attorney and telling him this information, none of these witnesses were called to testify at Mr. Adams' trial.

Given that Mr. Adams' defense was that he had nothing to do with the gun and that the shed was accessed by many people, it was not a legitimate trial strategy, nor was it objectively reasonable for Mr. Longacre to fail to call at least one or two of the numerous individuals who contacted him.

4. Mr. Adams received ineffective assistance of counsel where Mr. Longacre failed to communicate the State's offer of a plea agreement with a potential 24 month sentence.

Failure by a trial counsel to communicate plea offers to a criminal defendant has been recognized by both Washington courts and the United States Supreme Court to be ineffective assistance of counsel:

> [F]ailure to communicate a plea bargain or failure to discuss a potential plea bargain may constitute ineffective assistance of counsel.
>
> Defense counsel is under an ethical duty to discuss plea negotiations with his clients, under either the old Code of Professional Responsibility or the new Rules of Professional Conduct. [Citations omitted.] If he did not, a breach occurred, indicating deficient performance.
>
> Plea bargaining has been recognized as "an essential component of the administration of justice". *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971). A defendant is entitled to counsel in plea negotiations and in the plea process, under the Sixth Amendment and article 1, section 22 of the Washington State Constitution. *State v. Swindell*, 93 Wn.2d 192, 198, 607 P.2d 852 (1980); *State v. Johnson*, 23 Wn.App. 490, 497, 596 P.2d 308 (1979). The counsel required is effective counsel."

State v. James, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987).

> [D]efense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for

> the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Missouri v. Frye, ___ U.S. ___, 132 S.Ct. 1399, 1408 (2012).

As recently as July of 2012, this court affirmed that defense counsel ***must*** communicate all plea offers with his client and the failure to do so constitutes ineffective assistance of counsel:

> In light of the Supreme Court's recent rulings in *Lafler v. Cooper*, —— U.S. ——, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), and *Missouri v. Frye*, —— U.S. ——, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012), it is clear that a defendant's right to counsel extends to plea negotiations. Defense counsel must actually and substantially assist a client in deciding whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). In the plea bargaining context, counsel must communicate actual offers, discuss tentative plea negotiations, and discuss the strengths and weaknesses of the defendant's case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty. *State v. James*, 48 Wn.App. 353, 362, 739 P.2d 1161 (1987) (collecting cases from other jurisdictions holding that defense counsel's failure to advise a client of a plea bargain offer amounts to ineffective assistance). We review the issue by asking whether defense counsel communicated the offers to the defendant and whether the defendant has demonstrated a reasonable probability that the defendant would have accepted the offer. *Cooper*, 132 S.Ct. at 1384; *Frye*, 132 S.Ct. at 1409.
>
> Counsel must, at a minimum, "reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *State v. A.N.J.*, 168 Wn.2d 91, 111–12, 225 P.3d 956 (2010).

State v. Edwards, 171 Wn.App. 379, 393-394, 294 P.3d 708 (2012).

Mr. Adams moved post trial to have his convictions vacated under CrR 7.5(a) and CrR 7.8(b)(5) on the basis that substantial justice had not been done because Mr. Longacre failed to communicate the plea offers to him. CP 259-262. No witness at the December 17, 2012 hearing testified that Mr. Longacre ever communicated the State's

offer of 24 months to Mr. Adams. The prosecutor testified and verified that she had communicated to Mr. Longacre the State's willingness to negotiate a plea where the State would recommend a sentence of 24 months and that Mr. Adams told the prosecutor after the trial that he was not aware that an offer of a 24 months recommendation had ever been made by the State. RP 38-43, 12-17-12. Mr. Adams personally testified that Mr. Longacre had never informed him of the State's offer of 24 months and that had such an offer been made, or even an offer of around 30 months been made, Mr. Adams would have accepted it. RP 56-68, 12-17-12. Mr. Adams' testimony was supported by the testimony of his father and numerous declarations submitted as attachments to Mr. Hershman's motions for new trial and relief from judgment. CP 189-239; RP 25-34, 12-17-12.

As stated in *Edwards,* this court reviews this issue by "asking whether defense counsel communicated the offers to the defendant and whether the defendant has demonstrated a reasonable probability that the defendant would have accepted the offer." *Edwards*, 171 Wn.App. at 394, 294 P.3d 708. No evidence, not even Mr. Longacre's own testimony, supports the conclusion that Mr. Longacre communicated the State's offer of a 24 month recommendation to Mr. Adams. In fact, all evidence introduced at the hearing, even the testimony of the prosecutor, clearly indicates that Mr. Adams was never made aware of the 24 month offer and that he would have taken such an offer had he been aware of it. It was ineffective assistance of counsel for Mr. Longacre to fail to inform Mr. Adams of the State's plea offers.

5. The verdict of the jury was contrary to the law and to the evidence introduced at trial in that the State presented insufficient evidence to establish that Mr. Adams knowingly possessed the gun found in the shed.

When the sufficiency of the evidence to convict the defendant of a crime is challenged on appeal, the appellate court reviews the evidence in the light most favorable to the State and determines whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. *State v. Hernandez*, 120 Wn.App. 389, 391-392, 85 P.3d 398 (2004), *citing State v. Tilton*, 149 Wn.2d 775, 786, 72 P.3d 735 (2003).

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

If there is insufficient evidence to prove an element, reversal is required and retrial is "unequivocally prohibited." *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

To prove that Mr. Adams committed second degree unlawful firearm possession, the State had to prove that Mr. Adams knowingly had a firearm in his possession or control. *See* RCW 9.41.040(2). Possession may be actual or constructive. *Staley*, 123 Wn.2d at 798, 872 P.2d 502. To establish constructive possession, the State had to show that Mr. Adams had dominion and control over the firearm or over the premises where the firearm was found. *Raleigh*, 157 Wn.App. at 737, 238 P.3d 1211; *State v. Mathews*, 4 Wn.App. 653, 656, 484 P.2d 942 (1971). Factors to consider when determining dominion and control include whether the defendant could reduce an object to actual possession and whether he had the ability to exclude others. *State v. McReynolds*, 117 Wn.App. 309, 341, 71 P.3d 663 (2003). Control need not be exclusive, but the State must show more than mere proximity to the firearm. *Raleigh*, 157 Wn.App. at 737.

Here, the firearm was found wrapped up and hidden in the shed. The gun was not found in Mr. Adams' actual possession. The State therefore had the burden of

establishing that Mr. Adams possessed the gun constructively.

The shed in which the firearm was found was a communal shed which numerous people had access to and in which numerous people stored their belongings. RP 322, 356-357, 4-19-12. No evidence was presented that anybody saw Mr. Adams in possession of the gun, nor was any evidence presented that anybody ever heard Mr. Adams claim he had a gun. In fact, other than the fact that Mr. Adams stored items in the shed in which the gun was found, there was no evidence linking Mr. Adams to the gun. The gun was discovered purely by accident when property in the trailer was moved. It was not established where the gun fell from or who owned the item from which the gun fell. The State produced no evidence that Mr. Adams could reduce the firearm his actual possession immediately or exclude others from accessing the shed and therefore the firearm. In fact, the State failed even to present evidence that Mr. Adams was in close proximity to the gun.

Finally, the State presented no evidence which would suggest that Mr. Adams had any knowledge that the firearm was in the shed. Mr. Adams' testimony that he had no knowledge of the firearm was uncontested at trial.

A fact finder is permitted to draw inferences from the facts, so long as those inferences are rationally related to the proven fact. *State v. Bencivenga*, 137 Wn.2d 703, 707, 974 P.2d 832 (1999). The existence of a fact cannot rest upon guess, speculation or conjecture. *State v. Carter*, 5 Wn.App. 802, 807, 490 P.2d 1346 (1971), *review denied*, 80 Wn.2d 1004 (1972). In this case, the jury specifically asked for clarification of the terms "dominion and control" and the rule that possession need not be exclusive with regards to establishing constructive possession. The jury was clearly struggling with whether or not the State had met its burden in establishing that Mr. Adams possessed the firearm.

The State failed to present evidence sufficient to prove that Mr. Adams was in actual or constructive possession of a firearm. Assuming, *arguendo*, that the State did present evidence sufficient to establish constructive possession, the State presented no evidence that would support a finding that Mr. Adams *knowingly* possessed the firearm. Any conclusion by the jury that Mr. Adams knew of the existence of the firearm would be pure guess, speculation, and conjecture. The State presented insufficient evidence to convict Mr. Adams of unlawful possession of a firearm, and the jury's verdict finding Mr. Adams guilty of unlawful possession of a firearm was contrary to the law and to the evidence presented at trial.

6. The trial court abused its discretion in not vacating Mr. Adams' convictions where he received ineffective assistance of counsel and that ineffective assistance led to his conviction.

The post-trial motions filed by Mr. Hershman sought relief under CrR 7.5(a)(7), CrR 7.5(a)(8), and CrR 7.8(b)(5). CP 143-239, 259-262.

CrR 7.5(a) provides, in pertinent part,

> The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:
>
> ***
>
> (7) That the verdict or decision is contrary to law and the evidence;
>
> (8) That substantial justice has not been done.

CrR 7.8(b)(5) provides that the court may relieve a party from a final judgment, order, or proceeding for any reason justifying relief from the operation of the judgment.

The decision to grant or deny a new trial will not be disturbed unless it constitutes a manifest abuse of discretion. *State v. Jackman*, 113 Wn.2d 772, 777, 783 P.2d 580 (1989). A trial court's ruling on a CrR 7.8 motion is reviewed for abuse of discretion.

State v. Martinez, 161 Wn.App. 436, 440, 253 P.3d 445, *review denied*, 172 Wn.2d 1011, 259 P.3d 1109 (2011). An abuse of discretion exists unless it can realistically be said that "no reasonable person would take the position adopted by the trial court." *State v. Clapp*, 67 Wn.App. 263, 272, 834 P.2d 1101 (1992), *review denied*, 121 Wash.2d 1020, 854 P.2d 42 (1993).

As discussed above, the jury instructions misstated the law and were confusing to the jury. The failure of Mr. Adams' prior trial counsel to object to the conflicting instructions and to ensure the jury was fully and accurately instructed on the meaning of the phrase "dominion and control" and how that concept interplays with exclusive possession for purposes of determining whether or not an individual is in constructive possession of an item was ineffective assistance of counsel on the facts of this case. Substantial justice was not done since the jury was not correctly instructed on the law relating to the crime of unlawful possession of a firearm and was not fully and completely informed of Mr. Adams' defense in this case.

Further, the failure of Mr. Adams' prior trial counsel to call witnesses that he was aware of and who would have offered strong testimony in support of Mr. Adams' defense was not a legitimate trial strategy nor objectively reasonable.

The prejudiced caused by each of these errors by Mr. Adams' trial counsel compounds the prejudice caused by the other. The combination of these errors severely prejudiced Mr. Adams since whether or not he had dominion and control over the shed and was aware of the firearm were the central issues in the case. Substantial justice was not done in this case since Mr. Adams' trial counsel failed to present highly relevant and probative testimony and failed to ensure the jury was completely and accurately

instructed about the elements of the crime.

Additionally, it was ineffective assistance of counsel for Mr. Adams' trial counsel to fail to communicate all plea offers from the State to Mr. Adams. This created a situation where substantial justice was not done as a matter of law.

Finally, the jury's verdict was contrary to the law of Washington in that the State presented insufficient evidence to establish that Mr. Adams ever knowingly possessed, either actually or constructively, the firearm in question.

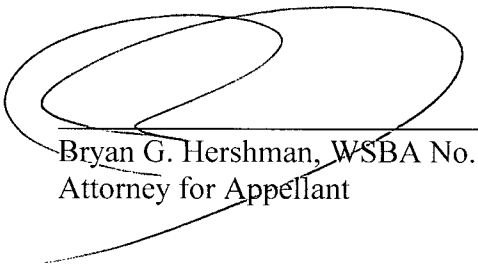
Given the overwhelming evidence that Mr. Longacre failed to communicate the State's plea offers to Mr. Adams, and given the lack of sufficient evidence to convict Mr. Adams of unlawful possession of a firearm, and given the incorrect jury instructions and Mr. Longacre's failure to object to those instructions or to request clarifying instructions, no reasonable court would have denied Mr. Adams post-trial motions for a new trial and relief from judgment. The trial court abused its discretion in denying the motions.

E. CONCLUSION

This court should vacate Mr. Adams' conviction for unlawful possession of a firearm and remand for dismissal of that charge with prejudice. Further, this court should vacate Mr. Adams' convictions for assault and unlawful imprisonment and remand for a new trial with new trial counsel.

DATED this 30th day of May, 2013.

Respectfully submitted,



Bryan G. Hershman, WSBA No. 14380
Attorney for Appellant

No. 44387-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN THE MATTER OF
Norman R. Adams

Appellant,

v.

State of Washington,
Respondent.

CERTIFICATE OF SERVICE

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THIS IS TO CERTIFY that copies of the Opening Brief of Appellant, and transcripts have been provided to the Kitsap County Prosecuting Attorney's Office; and

THIS IS TO CERTIFY that copies of the Opening Brief of Appellant have been provided to the Court of Appeals, Division II.

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Dated this 31st day of May, 2013.

Kristin Husebye
Legal Assistant
Bryan G. Hershman Law Office

5/31/2013 3:58 PM

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AMENDED CERTIFICATE OF SERVICE

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THIS IS TO CERTIFY that copies of the Opening Brief of Appellant have been provided to the Appellant. Norman Adams;

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Dated this 31ST day of May, 2013.

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